



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 182 of 2003

FRANCIS CAREY APANGA (t/a XENNON FREIGHT SERVICES).....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....  
DEFENDANT

R U L I N G

The Plaintiff, **FRANCIS CAREY APANGA**, sought the following main reliefs in his further amended plaint dated 30<sup>th</sup> July, 2004:-

- (a) *A mandatory injunction to compel the Defendant to issue to the Plaintiff or his agent a replacement cheque for banker's draft No. 025919 dated 10<sup>th</sup> August, 1993.*
- (b) *General damages.*

It is the Plaintiff's case that the said banker's draft is irretrievably lost, and that the Defendant is obliged under the law to replace it. There are averments of fraud and/or deceit on the Defendant's part in respect to the claim for replacement of the banker's draft. Other averments with regard to the claim for general damages are also pleaded. In an amended defence dated 6<sup>th</sup> August, 2004 the Plaintiff's claim has been denied. The particulars of fraud and deceit are denied, and the claim for damages averred to be too remote. It is also pleaded, *inter alia*, that the Plaintiff's claim is statute-barred.

The Plaintiff has now come to court by chamber summons dated 29<sup>th</sup> September, 2005 under Order 6, rule 1 (b) (c) and (d) and Order 12, rule 6 of the Civil Procedure Rules, seeking the following main orders:-

- (1) **That the amended defence dated 6<sup>th</sup> August, 2004 be struck out with costs.**
- (2) **That judgment on liability be entered against the Defendant.**
- (3) **That the suit be set down for formal proof and assessment of damages.**

The grounds for the application as stated on the face thereof are that the amended defence is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; that it is

otherwise an abuse of the process of the court; and that liability to replace the banker's cheque has been admitted.

There are three affidavits sworn in support of the application. The first one is by the Plaintiff in which he sets out his case in and submissions on this application. The second supporting affidavit is by one JACOB NGAO, an inspector of police, who depones that he is not in possession of the banker's cheque, the subject of the suit. The third supporting affidavit is by one MICHEAL MUCHIRI, a chief inspector of police, who depones that the banker's cheque is not in the possession or custody of Railyways Police Station, Nairobi.

The Defendant has opposed the application upon the grounds set out in the grounds of opposition dated 17<sup>th</sup> November, 2005. Those grounds are that the application is defective and bad in law; that it is brought under the wrong provisions of the law; that it is an afterthought and contradicts the pleadings and other documents filed; that it is an attempt to avoid a trial of the action; that the matters set out in the supporting affidavit are incapable of being decided other than through a trial; that there is no admission of liability; that there are triable issues necessitating trial; and that it is in the interests of justice that the orders sought be refused. A replying affidavit is also filed. It is sworn by one SAMUEL OKERO IGONYI, a fraud investigation officer with the Defendant. Mr. Igonyi has deponed that the genesis of the dispute in this suit is a fraud in which the Plaintiff was involved, and for which he was being sought by the police for arrest; that the fraud was investigated by the same Inspector Ngao who has now sworn an affidavit in support of the Plaintiff's application. Mr. Igonyi has deponed to other matters connected with the investigation. But he has not contested, in terms, the Plaintiff's assertion that the banker's cheque is irretrievably lost.

I have considered the submissions of the learned counsels appearing. If the Plaintiff's claim were confined only to replacement or cancellation of the banker's cheque, I would have had no hesitation in allowing the application as, on the material placed before the court, it does appear that the banker's cheque is irretrievably lost. Furthermore, replacement or cancellation of the cheque, in my judgment, would not occasion the Defendant any prejudice at all as long as the Plaintiff gives the necessary undertaking with regard to indemnity. There is no dispute that the banker's cheque has never been presented for payment. The police have denied that they are in possession of it. The drawee of it, the Central Bank of Kenya, also appears to have denied being in possession of it. In these circumstances, the Defendant's insistence that the Plaintiff do produce the cheque for cancellation or re-issuance does appear to be unreasonable. Its position that the cheque is with the police in a fraud investigation involving the Plaintiff is not supported by the material before the court. The Plaintiff's contention that the Defendant is unjustly and unreasonably holding onto his money does appear, *prima facie*, to be justified.

But the Plaintiff has claimed more. He has alleged fraud and deceit on the part of the Defendant in declining to replace the cheque. He has given particulars of the alleged fraud and deceit, which the Defendant has denied. The Plaintiff has also alleged negligence on the part of the Defendant, and breach of its fiduciary duty of care owed to him. He has given particulars of negligence, which had been denied by the Defendant. The Plaintiff has also claimed general damages, particulars of which he has given. They have been denied by the Defendant. All the matters set out in this paragraph cannot be resolved at this stage. They are issues that must go to trial. It would be desirable, in the circumstances of this case, that the entire claim of the Plaintiff do go to trial, notwithstanding that the Defendant's liability to replace or cancel the banker's cheque appears to be incontestable. This is because of the Plaintiff's allegations of fraud, deceit and negligence, and his further claim for general damages.

In the circumstances therefore, I will refuse the application. It is hereby dismissed. The just order for costs, in the circumstances of this case, would be that they be in the cause. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> FEBRUARY, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2006.**